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In The

# Supreme Court of the United States

October Term, 1987

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METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, et al.,

*Petitioners,*

vs.

STATE OF TENNESSEE, et al.,

*Respondents.*

—o—

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

—o—

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## QUESTIONS PRESENTED

1. Whether the Eleventh Amendment bars the district court from ordering that funds be expended from the treasury of the state of Tennessee to indemnify the Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, for 60% of the desegregation costs for its public school system?

2. If not, then whether such relief would be an inappropriate exercise of federal equity jurisdiction and an impermissible intrusion upon state legislative authority?

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STATE OF TENNESSEE, et al.,

*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The respondents respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Sixth Circuit's opinion in this case. That opinion is reported at 836 F.2d 986 (6th Cir. 1987) (Petition to rehear and for rehearing *en banc* was denied on March 15, 1988).

## STATEMENT OF THE CASE

This third-party action involves an attempt by a local governmental unit, the Metropolitan Board of Nashville and Davidson County, Tennesee (Metro), to have its sovereign, the State of Tennessee, indemnify it for a portion of the costs of court-ordered desegregation of Metro's schools. This is not a desegregation action in which victims of segregation seek relief. Rather, it is an attempt by a judicially-determined constitutional wrongdoer to escape the full burden of its actions and to shift a portion of that burden to the State, despite the bar presented by the Eleventh Amendment, and despite the limitations on the reasonable exercise of federal court equity jurisdiction.

### A. The Indemnification Action (*Metro v. State—1981 to Present*)

The petition arises from a third-party action[1] brought by Metro against the State of Tennessee, the State Board of Education and certain state officials (State)[2]. This indemnification action is an action for money to fund a

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[1]For covenience and clarity, the third-party action *(Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, et al. v. State of Tennessee, et al.)* which is the basis of the petition will be referred to as the "indemnification action." The original litigation *(Kelley, et al. v. Metropolitan County Board of Education, et al.)* will be referred to as the "desegregation action."

[2]Pursuant to Rule 40.3 of the Supreme Court Rules Ned Ray McWherter has been substituted for Lamar Alexander as Governor of Tennessee, Charles E. Smith has been substituted for Robert L. McElrath as Commissioner of Education, and Sam Kennedy, Sr. and Robert Byrd have been substituted for Frank Gorrell and Judge Paul Summers as members of the State Board of Education sued in their official capacities.

portion[3] of the relief Metro has been ordered to provide to victims of segregation in the desegregation action, *Kelley v. Metropolitan Board of Education*, 687 F.2d 814 (6th Cir. 1982).

On March 26, 1981, Metro (the defendant in the then 26 year old lawsuit involving desegregation of Metro's schools), filed a third-party complaint against the State seeking to have the State bear the cost of school desegregation in Nashville and Davidson County over and above the general support for its educational system which Metro already receives from the State. (Appendix, A-17).

The State filed a motion to vacate the order making the state defendants parties on June 1, 1981. On March 9, 1983, the district court denied the State's motion to vacate. (Appendix A-27). Both Metro and the State filed motions for summary judgment. On August 14, 1985, the district court entered an order requiring the State to pay 60% of the costs of Metro's desegregation program from the date the third-party complaint was filed. *Kelley v. Metropolitan Board of Education*, 615 F.Supp. 1139 (M.D. Tenn. 1985).

On appeal by the State, the Court of Appeals for the Sixth Circuit reversed the district court and ordered that judgment be entered in favor of the State. The court held that in this contest "about money", the Eleventh Amendment barred the indemnification action by Metro, a politi-

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[3]In fact, the third-party complaint, as amended, asks that the State "indemnify" Metro for *all* costs and expenses incurred by Metro as a result of the *Kelley* litigation, including costs of the remedies ordered. (Appendix, A-5).

cal subdivision of the State, against the State. The court further held that equitable considerations compel caution in judicial interference in policy and political decisions on how the costs of desegregation are distributed between a state and one of its own subdivisions.

### B. The Desegregation Action (*Kelley v. Metro—1955 to Present*)

After this Court's decisions in *Brown v. Board of Education*, 347 U.S. 483 (1954) (*Brown I*) and *Brown v. Board of Education*, 349 U.S. 294 (1955) (*Brown II*), on June 16, 1955 then Tennessee Attorney General George McCanless issued an opinion letter to the Tennessee Commissioner of Education which stated that, under Tennessee law, the timing, method, and implementation of school desegregation was the responsibility of local school districts who must apply the law to the unique circumstances of their own situations. This letter formed the basis of the State's policy on desegregation of public education.[4]

On September 23, 1955, the desegregation action was filed against the Nashville City Board of Education by a group of black school children and their parents. No State defendants were named. On October 5, 1956, the Tennessee Supreme Court rendered its opinion in *Roy v. Brittain*, 201 Tenn. 140, 297 S.W.2d 72 (1956), holding that all state statutes mandating segregated public education (and, by necessary implication, the underlying State con-

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[4]The Sixth Circuit noted that the policy of the State of Tennessee to let local school systems "pull the laboring oar in attempting to eliminate the consequences of segregation" was not an evasion of state responsibility. *Kelley*, 836 F.2d at 994. The letter is quoted extensively in *Kelley v. Metropolitan Board*, 615 F.Supp. 1139, 1143 (M.D. Tenn. 1985).

stitutional provision as well) were invalid and must yield to the principles enunciated in *Brown*.[5] *Id.* at 144.

On January 21, 1957, the district court approved a plan submitted by the City Board for desegregation of Nashville's first grade and ordered a plan for complete desegregation to be submitted by December 31, 1957. The Board submitted a plan grounded on the Parental Preference Statute which had been declared unconstitutional by the district court on September 1, 1957, despite a warning by the court not to do so. The plan was disapproved in *Kelley v. Board of Education*, 157 F.Supp. 272 (M.D. Tenn. 1958).

In June of 1958, the district court approved a plan calling for elimination of compulsory segregation in the second grade as of academic years 1958-59, and in one additional grade per year thereafter. *Kelley v. Board of Education*, 3 Race Rel. L. Rptr. 651 (M.D. Tenn. 1958) *aff'd*, 270 F.2d 209, *cert. denied* 361 U.S. 924 (1959). Suit was filed to desegregate the Davidson County public schools on December 19, 1960. Again, there were no State defendants named. On September 10, 1963, after adoption of metropolitan government for Nashville and Davidson County, the city and county cases were consolidated by consent.

In 1971, the district court, because of Metro's "apparently half hearted efforts to devise a unitary school sys-

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[5]Again, the Sixth Circuit noted the Tennessee Supreme Court's decision, and the fact that the system of *de jure* segregation was completely dismantled in the 1960s. The court specifically found that the "state's duty in this respect was discharged long before Metro filed its third-party complaint against the State." *Kelley*, 836 F.2d at 994.

tem that would encourage integration," implemented a wide ranging plan, including busing for desegregation purposes. *See Kelley v. Metropolitan Board of Education*, 492 F.Supp. 167, 171 (M.D. Tenn. 1980).[6] In August, 1972, the district court issued a memorandum finding that Metro had not made a good faith effort to comply with the court ordered integration plan. After a hearing, the court noted the "consistent refusal of the school board and the City Council to provide an adequate number of school buses to implement effectively the plan of this Court. There is ample evidence that they are capable of doing so." In effect, concluded the court, Metro had "endeavored to accomplish indirectly what [they] cannot permissibly accomplish directly—the frustration of this Court's plan to establish a racially integrated school system." (Appendix, A-41).

In 1979, the district court, after hearings, ordered that Metro devise and submit to the court a new plan for desegregation that would, among other things, involve the entire metropolitan county. The district court held extensive hearings on plans submitted by the parties, beginning March 3, 1980 and ending May 1, 1980. In an order dated May 20, 1980, the district court rejected plans presented and ordered Metro to submit a new plan and gave specific directives based upon the court's analysis of the specific burdens and benefits emanating from the "*Swann*-type remedy" ordered by the court in 1971. (Petitioner's Appendix, A-122, 166).

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[6]Subsequently, the Court of Appeals for the Sixth Circuit found that the Metropolitan School Board had not acted in good faith and had implemented the 1971 plan in a manner that actually prevented effective desegregation. *Kelley v. Metropolitan Board of Education*, 687 F.2d 814 (6th Cir. 1982).

The Board filed its new plan on January 19, 1981. The district court entered an order approving the Board's plan on April 17, 1981. This order was clearly based upon the hearings held prior to the May 20, 1980 order.[7]

The plaintiffs appealed to the court of appeals, which by opinion dated July 27, 1982, affirmed in part and reversed in part. In that proceeding before the Sixth Circuit, the State was not included as a party. *Kelley v. Metropolitan Board of Education,* 687 F.2d 814 (6th Cir. 1982). On June 1, 1983, the district court, considering the case on remand, entered an order and memorandum approving a new plan submitted by the Board and agreed to by the plaintiffs.

**C. The Court of Appeals' Decision** (*Metro v. State*)

The court of appeals' decision which Metro seeks to have reviewed is based upon the unique factual situation and procedural posture of this case.

The court pointed out that this third party action does not involve the rights of plaintiffs suing for relief from the effects of segregation and that those plaintiffs are receiving full relief. *Kelley,* 836 F.2d at 989-990. The court correctly framed the issue presented, stating "the contest between Metro and the State of Tennessee is a contest not about desegregation, but about money." *Kelley,* 836 F.2d at 990.

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[7]In its memorandum opinion denying the State's motion to vacate the order joining the State defendants, the district court stated that the original order making State defendants parties "did not provide State defendants a meaningful opportunity to participate in the 1981 hearings." (Appendix A-30).

In its analysis of Eleventh Amendment principles and the "prospective compliance exception" in this case, the court once again recognized the unique situation presented. It found three things: (1) the State "participation" ordered by the district court consisted solely of financial participation; (2) the order to pay money was ancillary to no other affirmative relief; and (3) the State officials were not currently doing anything wrong. *Kelley,* 836 F.2d at 990-991. In addition, the court held that the district court's finding, coming 30 years after the institution of the desegregation lawsuit, that the State "is a 'constitutional wrongdoer' ", is not supported by the record. *Kelley,* 836 F.2d at 995.

The court further examined the role of federal courts, exercising their equitable jurisdiction, in disputes over money between a state and one of its political subdivisions. Again, the court's examination was grounded in the particular situation presented. The court particularly noted that Metro had failed to assert any claim against the State until "a decade after busing was ordered and a quarter of a century after this lawsuit was begun." *Kelley,* 836 F.2d at 1000. The court recognized the authority of federal courts to order integration, but also recognized the authority of the Tennessee legislature to determine how costs of desegregation, as well as other costs of education, should be funded. *Kelley,* 836 F.2d at 995-996.

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## REASONS FOR DENYING THE WRIT

### I.

### THE COURT OF APPEALS' DECISION IN THIS INDEMNIFICATION ACTION THAT THE ELEVENTH AMENDMENT BARS METRO'S RECOVERY OF 60% OF ITS DESEGREGATION COSTS FROM THE STATE IS CONSISTENT WITH THE PRECEDENTS OF THIS COURT

The Eleventh Amendment provides that the "Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State." This constitutional provision bars actions against States for the recovery of money; however, Metro argues that the prospective compliance exception to the Eleventh Amendment[8] "has been utilized regularly in desegregation cases" and should not prohibit the monetary relief awarded by the district court in this case. Petition for Writ of Certiorari, p. 17 (Petition). This position ignores a line of decisions of this Court which limits the breadth of the prospective compliance exception[9] and misinterprets the holding of this Court in *Milliken v. Bradley*, 433 U.S. 267 (1977).

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[8]The prospective compliance exception to the Eleventh Amendment was first enunciated by this Court in *Ex Parte Young*, 209 U.S. 123 (1908) in which this Court held that the Attorney General of Minnesota was enjoined from enforcing a statute inconsistent with the Fourteenth Amendment.

[9]Metro notes that the court of appeals "relies upon a number of cases which do not involve desegregation remedies nor the concept of continuing constitutional violation." Petition, p. 18.

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In *Edelman v. Jordan*, 415 U.S. 651 (1974), Chief Justice Rehnquist rejected the argument that the Eleventh Amendment did not bar relief in the form of equitable restitution instead of money damages:

> We do not read *Ex Parte Young* or subsequent holdings of this Court to indicate that any form of relief may be awarded against a state officer, no matter how it may in practice resemble a money judgment payable out of the state treasury, so long as the relief may be labeled "equitable" in nature.

*Id.* at 666. *See also Papasan v. Allain*, 106 S.Ct. 2932 at 2941 (1986) (In determining whether particular relief is barred by the Eleventh Amendment, the court will "look to the substance rather than the form of the relief sought.") In the present case, the fact that the district court fashioned the relief in equitable form is irrelevant when the substance of the entire relief against the State was indemnification of 60% of the costs of desegregation to Metro.[10] Such relief is clearly barred by the Eleventh Amendment.

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The fact that the original action against Metro is a desegregation case does not render the decisions of this Court relied upon by the court of appeals to be inapplicable. Where the relief afforded against the State is solely the payment of money, such a remedy is barred by the Eleventh Amendment unless the State has waived its sovereign immunity or Congress has expressly abrogated that immunity through the Fourteenth Amendment. *Welch v. Texas Department of Highways and Public Transportation*, 107 S.Ct. 29, 41 (1987). There is no dispute that the State of Tennessee has not waived its immunity nor is there any congressional enactment abrogating that immunity in this case.

[10]As the Sixth Circuit stated "the 'participation' mandated by the district court's order is purely financial; the officials will not

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Likewise, in *Green v. Mansour*, 474 U.S. 64 (1985) this Court stated that although "[r]emedies designed to end a continuing violation of Federal law are necessary to vindicate the Federal interest in assuring the supremacy of that law, . . . compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment." [citation omitted] *Id.* at 68. Contrary to Metro's argument, the relief requested against the State is compensatory in nature. Metro seeks to be indemnified by the State for its alleged past wrongdoing with respect to the desegregation of the Nashville public schools. (Appendix, A-14-15). The plaintiffs in the desegregation action have obtained complete relief.[11] The relief afforded by

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be in contempt of the court's order if they pay 60% of Metro's desegregation costs out of the state treasury, and they will be in contempt if they fail to do so." *Kelley*, 836 F.2d at 990.

[11]In this respect, the court of appeals stated the following:

> It bears emphasis that we are not here called upon to adjudicate the right of plaintiffs' suing to obtain the equal education opportunities promised them in *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). Those plaintiffs have long since won their case. They won it without ever having asserted a claim against the State. They are already receiving—through decrees that do no violence to the principle of sovereign immunity—the full measure of relief to which they are entitled under the constitution.
>
> The issue before us is not whether the children in Metro's schools will receive the benefits of the enhanced educational program that the district court ordered Metro to develop and implement . . . Metro makes no claim . . . that it is incapable of complying with educational components of the plan. Similarly,

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the district court in this indemnification action is granted solely to Metro not the plaintiffs in the desegregation action. Since the plaintiffs have been afforded total relief in the desegregation action, no further relief is necessary to enforce their constitutional rights. Thus, the district court's order that the State indemnify Metro for 60% of its costs incurred for desegregation is compensatory in nature and barred by the Eleventh Amendment.

As for this Court's decision in *Milliken*, the relief afforded against the State of Michigan was the requirement that "the Detroit Board and the State put into effect certain comprehensive programs which were found to be essential to the success of the desegregation effort." *Milliken v. Bradley*, 540 F.2d 229, 240 (6th Cir. 1976). The result of the order in the *Milliken* case was to require the State of Michigan to conform its conduct to the constitution by removing vestiges of segregation through the in-

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> the issue is not whether the school children will be transported in accordance with the mandatory busing plan, which, as modified several years ago to meet the requirements of this Court, has been in effect for more than a decade and a half. That busing plan, we are told, has been fully implemented.

*Kelley*, 836 F.2d at 989-990. Even Metro admits that it is "minimally" funding the desegregation plan ordered by the court of appeals but complains that it has had to curtail educational programs to do so. Petition, p. 20. Metro's funding concerns could be remedied at the local level by increasing revenues through alternatives such as tax rate adjustments, Tenn. Code Ann. § 49-3-315 (Supp. 1987) (Appendix A-1), or by using funds not now earmarked for educational programs. However, instead of accepting responsibilitiy for the cost of desegregation, Metro seeks to spread the cost of the desegregation of its schools upon all the taxpayers of the State by demanding reimbursement of its desegregation costs from the State.

stitution of specific programs which had the ancillary effect of additional expenditure of State funds.

Metro asserts that the State of Michigan was no more than a "recalcitrant financial participant" in the desegregation program. Petition, p. 19, fn. 16. This argument ignores the fact that the State of Michigan was an original defendant in the *Milliken* case when it was filed in 1970 and was required to do more than pay a portion of the desegregation costs. For example, of the four educational components of the desegregation plan for the City of Detroit, this Court noted that "the Detroit Board and the State Department of Education [were ordered] to institute a testing program along the lines proposed by the local school board in its original desegregation plan." *Milliken,* 433 U.S. at 276. In the case at bar, the State was not a defendant to the original desegregation action filed against Metro and was brought into this case as a third-party defendant by Metro more than 25 years after the original action was filed. More importantly, the only relief afforded against the State by the district court was the payment of money which is barred by the Eleventh Amendment.[12]

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[12]This Court stated in the *Edelman* case that "we must judge the award actually made in this case, and not one which might have been differently tailored in a different case . . ." *Edelman v. Jordan,* 415 U.S. at 665. In 1981, well into the remedial stages of this litigation, Metro sued the State as a third-party defendant to indemnify Metro for its costs of desegregation. Metro is bound by those facts and barred by the Eleventh Amendment from any recovery.

## II.

## THE HOLDING OF THE SIXTH CIRCUIT IN THIS THIRD-PARTY ACTION FOR INDEMNIFICATION DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUITS IN DESEGREGATION CASES.

Decisions of the Seventh and Eighth Circuits cited by Metro are distinguishable from its present idemnification action to obtain after-the-fact funding from the State for its own court-ordered desegregation plans. *See Jenkins v. State of Missouri*, 807 F.2d 657 (8th Cir. 1986); *Little Rock School District v. Pulaski County Special School District*, 778 F.2d 404 (8th Cir. 1985), *cert. denied*, 106 S.Ct. 292 (1986); *Liddell v. Board of Education of the City of St. Louis*, 667 F.2d 643 (8th Cir. 1981), *cert. denied*, 454 U.S. 1081 (1982); *United States v. Board of School Commissioners of the City of Indianapolis*, 677 F.2d 1185 (7th Cir.), *cert. denied*, 459 U.S. 1986 (1982).

Typically, the cited cases represent the efforts of individual victims of discrimination or their representatives to have remedial plans instituted in school systems where the vestiges of racial segregation had been wholly ignored or actively perpetuated by local and state governments for decades after this Court's decision in *Brown I*. In the face of timely claims for immediate injunctive relief by actual victims, application of the prospective compliance exception to Eleventh Amendment immunity was hardly at issue.[13]

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[13]In cases where victim-plaintiffs fit easily into the *Milliken* framework, lower court opinions devoted little or no attention to analysis of the Eleventh Amendment. However, a local school

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This action has been aptly characterized by the court of appeals as "essentially a suit for the recovery of money from the State" by one of its political subdivisions. *Kelley*, 836 F.2d at 989. Cast in such a light, it is apparent that the issue of prospective relief for victims of discrimination is not the subject of this indemnification action. Because the issues in the cited desegregation cases are different from those in this indemnification action, there is no conflict among the circuits.

Further distinguishing this indemnification action from the cited Seventh and Eighth circuit cases is Metro's status in this litigation. Metro, an adjudicated constitutional wrongdoer, has belatedly attempted to dodge court imposed financial responsibility for its own desegregation plans by "stepping into the shoes" of victims and pointing a finger at the state, a non-party to the desegregation action.[14] The court of appeals correctly determined that

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district plaintiff attempting to recover from the State was not so automatically presumed to fit within the prospective relief exception. In the initial stages of the *Little Rock* case, where a school district was the sole plaintiff, the district court dismissed the State as a defendant stating "The motion to dismiss the State of Arkansas must of course be granted. Injunctive relief could not be awarded the plaintiff against the state absent its consent to be sued. *Alabama v. Pugh*, 438 U.S. 781, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978)", *Little Rock School District v. Pulaski County Special School District No. 1*, 560 F.Supp. 876 (E.D. Ark. 1983).

[14]Metro's self-serving statements regarding "stepping into the shoes" of the original *Kelley* plaintiffs, are an attempt to avoid long settled doctrine established by this Court that "Being but creatures of the State, municipal corporations have no standing to invoke . . . the provisions of the Fourteenth Amendment of

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Metro is prevented by the Eleventh Amendment from so doing. None of the cases cited by Metro supports an expansion of the limited prospective compliance exception to the Eleventh Amendment such that non-victims may independently sue the state for money. The additional factor that Metro itself is a constitutional wrongdoer, further prevents its identification with victims of discrimination.[15]

From factual and historical perspectives, the cited cases depict a distinct pattern of long term state and local control over public schools which perpetuated racial segregation for decades after *Brown*. In each instance, claims of state involvement in interdistrict violations were presented. In the *Indianapolis* case, the State of Indiana was found *solely* responsible for interdistrict violations. *Indianapolis*, 677 F.2d at 1187. Imposition of liability upon state defendants in the *Little Rock* case was based upon proof of active and continuing state interference

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the Constitution in opposition to the will of their creator." *Coleman v. Miller*, 307 U.S. 433, 441 (1939). See also *Williams v. Mayor of Baltimore*, 289 U.S. 36 (1933); *City of Trenton v. New Jersey*, 262 U.S. 182 (1922). This principle is recognized in the lower federal courts, *see South Macomb Disposal Authority v. Township of Washington*, 790 F.2d 500 (6th Cir. 1986); *United States v. State of Alabama*, 791 F.2d 1450 (11th Cir. 1986), and on the state level, *City of Knoxville v. State ex rel. Hayward*, 175 Tenn. 159, 133 S.W.2d 465 (1939). The Sixth Circuit opinion discusses and applies this principle, yet Metro does not address it. *Kelley*, 836 F.2d at 998.

[15]In *Jenkins v. Missouri*, 807 F.2d 657 (8th Cir. 1986), where the Kansas City school district, along with individual plaintiffs, had originally filed suit against the State, the court of appeals affirmed the district court's realignment of the local school district as a defendant recognizing the local district's conflict of interest with individual victims and lack of standing to sue the state. *Id.* at 682.

with housing and school facility placement as well as enforcement of discriminatory laws perpetuating segregation. *Little Rock*, 778 F.2d at 411-17, 423-27. In *Liddell*, the State of Missouri's maintenance of a separate special district for vocational education within the St. Louis school district was found to be a factor contributing to segregation within the St. Louis system. *Liddell*, 667 F.2d at 651. In contrast, the Sixth Circuit, having reviewed the record in this case, found no proof of ongoing constitutional violations by the State of Tennessee. *Kelley*, 836 F.2d at 993-994. Furthermore, control over Metro desegregation has been in the hands of the district court since 1957.

Finally, the Sixth Circuit's decision is in fact consistent with that of the Fifth Circuit. In an analogous case, the Court of Appeals for the Fifth Circuit held that the Eleventh Amendment barred a local school district's attempt to recover money from the State to cover its desegregation expenditures. *United States v. Texas Education Agency*, 790 F.2d 1962, *cert. denied* 107 S.Ct. 874 (1986). That the local school district could have moved to amend the district court judgment to adjudicate the State's fault, but neglected to do so for a period of years, was of particular import to the decision reached. Like the Sixth Circuit in the present indemnification action, the Fifth Circuit rejected the suit as a "belated effort to recover costs which smacks of an attempted end-run around the Texas legislature's allocation of state funds." *Id.* at 1265.

## III.

## THE COURT OF APPEALS' OPINION THAT IT WOULD BE AN INAPPROPRIATE EXERCISE OF FEDERAL EQUITY JURISDICTION AND AN IMPERMISSIBLE INTRUSION UPON STATE LEGISLATIVE AUTHORITY TO REQUIRE THE STATE TO INDEMNIFY METRO FOR 60% OF ITS DESEGREGATION COSTS IS CONSISTENT WITH PRECEDENTS OF THIS COURT AND OTHER CIRCUITS

In concluding that a federal court should not intervene in the financial relationship between a state and one of its political subdivisions, the court of appeals was correctly adhering to established principles of equity as well as the opinions of this Court and the courts of appeal of other circuits. Moreover, this case is unique, and because of its particular factual history, its unusual alignment of parties and the mix of state and federal law involved, conclusions regarding the exercise of equity jurisdiction in this case would have limited application elsewhere.[16]

The exercise of federal jurisdiction to reallocate educational costs between this state and this political subdivision is unnecessary to protect any constitutional rights of the affected students. The plaintiffs who sued Metro, but have not sued the state, are already receiving full relief.

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[16]The court of appeals held that, in addition to the Eleventh Amendment, the relief in this case should be denied as an inappropriate exercise of Federal equity powers. Therefore, even if the Eleventh Amendment were held insufficient to bar review of this case, the petition should not be granted and the court of appeals reversed unless the appellate court's actions were found, after an examination of the facts, to be an improper exercise of its discretion.

*Kelley*, 836 F.2d at 989-90.[17] No further federal court action is needed to assure compliance with constitutional rights guaranteed these students.

Exercise of federal jurisdiction to reallocate certain educational costs is not only unnecessary to accomplish constitutional requirements, it is also inappropriate under the facts of this case. To open the doors of federal courts to such disputes is to invite political subdivisions to circumvent the statutory and constitutional processes by which the fifty states govern funding decisions[18] and to

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[17]Metro asserts that it is proper for it to "step into the shoes of the plaintiffs" (Petition, p. 13, n.9). To suggest that the plaintiffs who initiated this desegregation case over thirty years ago and have continued throughout to actively pursue it are litigants whose shoes need to be filled is to ignore their effective advocacy throughout. Furthermore, it would be ironic for such a role to be assigned to Metro, a litigant which for more than two decades opposed the plaintiffs.

In the one precedent cited by Metro, a 1974 court of appeals case, the opinion of the court (with each judge writing separately, one concurring in part and dissenting in part and the other dissenting) stated that "in the *unique facts of this case*, the Akron Board of Education has standing to bring this action. *Akron Board of Education v. State Board of Education of Ohio*, 490 F.2d 1285, 1291 (6th Cir. 1974), cert denied 417 US 932 (1974). (Emphasis added.) That case concluded that a local school board could seek an injunction to prevent an action "to deprive Akron school students of their constitutional right to attend nonsegregated schools." *Id.* at 1288. Here, however, the original plaintiffs, not Metro, fully protected the constitutional rights of students. Moreover, the relief sought is an award of money not an injunction to block an act by the state.

In fact, however, Metro "has sued solely in its own right . . . and thus is barred . . . by the principle recognized in *Dartmouth College* and *City of Trenton*." *Kelley*, 836 F.2d at 998. *See also* Footnote 14.

[18]For example Article II, Section 24 of the Constitution of the State of Tennessee provides that "No public money shall be expended except pursuant to appropriations made by law." (Appendix A-1)

impose a new and burdensome role for federal courts. This is an internal dispute between a state and one of its political subdivisions. Those disputes have been properly left for resolution outside the federal court system.[19]

What Metro has asked the federal courts to do is to choose one particular method of funding a county's educational costs rather than any other method and to impose that selection on the State. The court of appeals noted that "[t]he State currently underwrites about 30% of Metro's non-transportation costs, and it pays a still larger share of the costs of transportation; Metro, however, wants more." *Kelley*, 836 F.2d at 990. Although the court of appeals found that the plaintiffs have full relief and that desegregation costs are being paid, Metro asks that the burden be shifted.

It would be ironic and inappropriate for a political subdivision which fought desegregation of its schools for over two decades to be allowed to shift to others the financial burden of finally adhering to constitutional requirements. It would be inconsistent with sound principles of equity for a federal court to lift the burden from a political subdivision which has previously sought to avoid school integration and now seeks to avoid expenditures necessary to meet its constitutional obligations.

Metro asserts that "the Sixth Circuit has rejected the efforts of Davidson County . . . to both desegregate and to educate.' Petition, p. 23. The court of appeals has not. Instead it has told Metro that it must desegre-

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[19]See Footnote 14.

gate, that it must educate, and that those responsibilities will not be shifted to the State. Adequate funding for programs for desegregation and for education is possible within the legal authority to tax and spend at the local level of government.

Finally, the court of appeals noted that courts of equity "do not leave their doors open to prospective suitors forever." Nor can courts of equity expect that a third-party brought into a proceeding over twenty-six years after its inception is not prejudiced by its absence.[20] Furthermore, the district court's order of 60% indemnification of Metro bears no apparent connection to any prior acts of the state and is not a remedy tailored to any alleged present wrongful acts of the State. In fact there is no foundation in the record for the 60% allocation. *Kelley*, 836 F.2d at 1000.

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[20]The Court of Appeals for the Fifth Circuit noted such a delay in *United States v. Texas Education Agency*, 790 F.2d at 1265:

> [The Lubbock Independent School District ("LISD")] certainly could have moved in 1977—or as early as 1970—for the district court to amend its judgment so as explicitly to adjudicate the State of Texas' fault. See Fed.R.Civ.P. 60(b). Further, the LISD could have moved in 1977, once it became clear what the effort to desegregate would cost, that the court divide these costs among the parties deemed responsible for the then-existing segregation. *Cf. Milliken II*, 433 U.S. at 283. But the LISD pursued neither of these alternatives, and we express no view of what their proper resolution might have been. We are left instead with the LISD's belated effort to recover costs which smacks of an attempted end-run around the Texas legislature's allocation of state funds. Yet the State has not been an active party to this suit since 1970, and it has never been adjudicated responsible for that segregation in Lubbock which has proven costly to eliminate.

## CONCLUSION

Based upon the foregoing authorities and analyses, the respondents respectfully request this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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